No. 93-1199

In the Supreme Court of the United States

OCTOBER TERM, 1993

MARVIN STONE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the filing of a motion to reopen or reconsider a final order of deportation tolls the time for seeking judicial review of that order.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A11) is not yet reported. The decisions of the Board of Immigration Appeals (Pet. App. B1-B15, B16-B19) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1994. The petition for a writ of certiorari was filed on January 26, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a citizen of Canada who entered the United States as a visitor in 1977 and has resided here since that time. In 1983, he was convicted of mail fraud by a federal court. After the conviction was affirmed on appeal, he served 18 months of a three-year sentence. See Pet. App. A2, B2-B3.[1]

2. Following a hearing, an immigration judge determined that petitioner was deportable from the United States as an alien who was admitted as a visitor in 1977 and remained longer than permitted. The immigration judge also denied petitioner's application for suspension of deportation under 8 U.S.C. 1254(a) (1988 & Supp. IV 1992), concluding that petitioner was statutorily ineligible for that relief because his incarceration on the mail fraud charge prevented him from satisfying the statutory requirement of good moral character. See Pet. App. A3.

3. Petitioner appealed to the Board of Immigration Appeals, which dismissed his appeal on July 26, 1991. Pet. App. B1-B15. The Board first affirmed the immigration judge's finding of deportability. It noted that applicable regulations at the time of petitioner's entry limited the admission of nonimmigrant visitors to a period of six months, unless the visitor obtained an extension. Because petitioner never obtained an extension, the Board held that he was deportable. *Id.* at B5-B9.

[1] The statement by the Board of Immigration Appeals (Pet. App. B2) that petitioner entered in 1978 appears to be erroneous. The Board later in its opinion relied on petitioner's admission that he entered in 1977. *Id.* at B4; see *id.* at A2 (statement of court of appeals that petitioner entered in 1977). The precise year of entry has no bearing on petitioner's immigration status.

The Board also affirmed the immigration judge's conclusion that petitioner was not eligible for suspension of deportation. Suspension of deportation is available only to aliens "of good moral character," 8 U.S.C. 1254(a) (1988 & Supp. IV 1992), and 8 U.S.C. 1101(f)(7) bars a finding of good moral character for an individual "confined, as a result of conviction, to a penal institution for an aggregate period of one hundred and eighty days or more" during the seven years preceding his application for suspension. Because it was conceded that petitioner was confined for at least 18 months during that period, he was ineligible for suspension of deportation. Pet. App. B11-B12. In the alternative, the Board held that petitioner would not be eligible for suspension of deportation because he had "offered no evidence of extreme hardship." *Id.* at B14. Finally, the Board concluded that even if petitioner were eligible for suspension of deportation, it would deny relief in the exercise of discretion, explaining that petitioner previously had been convicted of mail fraud and that the record indicated that there were outstanding arrest warrants in Canada on charges of theft and fraud in that country. *Id.* at B14-B15.

4. Petitioner filed a motion for reconsideration, which the Board denied on February 3, 1993. Pet. App. B16-B19. The Board explained that petitioner's motion

> has presented no new precedent decisions which have any bearing on our prior decision in this case nor has [h]e submitted any legal authorities which the Board may have inadvertently overlooked. Moreover, both of [petitioner]'s assertions in his motion to reconsider were adequately addressed by the Board in its July 26, 1991, decision. Accordingly, we will deny the motion as frivolous.

Id. at B18.

5. In early 1993, petitioner filed a petition for review in the court of appeals.[2] The court of appeals dismissed the petition for review in part and denied it in part. Pet. App. A1-A11.

a. The court of appeals dismissed petitioner's challenge to the July 26, 1991, order of the Board. Pet. App. A4-A9. The court explained that 8 U.S.C. 1105a(a) (1988 & Supp. IV 1992) requires a petition for review to be filed within 90 days of the date of the Board's order, and petitioner's petition for review was filed more than 90 days after July 26, 1991. The court noted that before 1990 some courts of appeals had held that the filing of a motion to reopen or reconsider a final order of deportation would toll the time for filing a petition for review of the order. Pet. App. A5-A7. The court concluded, however, that a 1990 amendment to Section 1105a(a)[3] made that holding untenable, because the amendment contemplated separate petitions for review of the underlying order of deportation and of the order denying a motion for reopening or reconsideration. *Id.* at A8-A9. Accordingly, the court concluded that petitioner's motion for reconsideration did not toll the time for filing a petition for review challenging the Board's 1991 opinion, and it dismissed

[2] The court of appeals and the petition indicate that the petition for review was filed on March 25, 1993. See Pet. 6; Pet. App. A4. The docket sheet in the court of appeals, however, indicates that petitioner's opening brief was filed on that date, and that the petition for review actually was filed on February 16, 1993. The difference is not important, because both dates are more than 90 days after the initial decision of the Board and less than 90 days after its rejection of petitioner's motion for reconsideration.

[3] See 8 U.S.C. 1105a(a)(6) (Supp. IV 1992) (added by Section 545(b)(3) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5065).

his petition for review as untimely as to that order. *Id.* at A9.

The court of appeals also rejected petitioner's contention that the government should be estopped from relying on the jurisdictional bar because he allegedly received erroneous advice from government employees regarding the procedure for seeking judicial review. Pet. App. A9-A10. The court explained that estoppel would be available only if petitioner could prove "affirmative misconduct" by the government. In the court's view, petitioner had not established affirmative misconduct because the claim, at most, was that petitioner "(who was trained as a lawyer himself) may have been given imperfect legal advice on an area of the law that can fairly be said to have been unsettled." *Id.* at A9-A10.

b. Because petitioner's petition for review was filed within 90 days of the Board's denial of his motion for reconsideration, the court of appeals exercised jurisdiction over that portion of the petition for review. Pet. App. A10-A11. The court denied petitioner's challenge to the denial of his motion for reconsideration, however, explaining that "we fully agree with the Board's characterization of the motion as 'frivolous.'" *Id.* at A11.

ARGUMENT

Petitioner urges the Court to use this case to resolve a conflict in the circuits on the question whether the filing of a motion to reopen or reconsider tolls the time for seeking judicial review of a final order of deportation. Pet. 7-11. Although we believe the court of appeals correctly rejected petitioner's argument, petitioner is correct in asserting that the courts of appeals are in conflict on that question. Accordingly, we agree with

petitioner that plenary review by this Court is warranted.

1. Under 8 U.S.C. 1105a(a) (1988 & Supp. IV 1992), aliens who are not aggravated felons may file petitions in the court of appeals for review of "final orders of deportation" no later than 90 days after the Board's issuance of the order.[4] Because Section 1105a(a) provides that the filing of such a petition is the "sole and exclusive procedure" for securing review of such orders, and because Section 1105a(c) imposes an express requirement that the alien exhaust available administrative remedies, the courts of appeals have jurisdiction only over challenges to final orders of deportation.

As we discuss below, some courts of appeals have concluded that an order of deportation is not final if the alien has filed a motion to reopen or reconsider the order. That conclusion is consistent with the treatment of motions to reopen or reconsider in other settings. See, *e.g.*, *ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 284-285 (1987). Under that approach, the time for filing such a petition would not commence to run until the Board disposed of the pending motion.[5]

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[4] The Act formerly permitted six months to file a petition for review, 8 U.S.C. 1105a(a) (1988), but the time period was shortened by Section 545(b)(1) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5065. The shortened time period applies to all final orders entered on or after January 1, 1991. 1990 Act § 545(g)(4), 104 Stat. 5067. That provision applies to this case because petitioner's final order of deportation was entered on July 26, 1991.

[5] Our view is not in all cases adverse to the interests of the alien. When an alien seeks prompt review of the decision of the Board, even though he has filed a motion to reopen or reconsider, our view allows the alien to do so, whereas the contrary view bars the alien from obtaining review until the Board disposes of the

In our view, that process is not conducive to orderly administration of the immigration laws, because it is likely to lead to lengthy delays between the Board's entry of final orders of deportation and review by the courts of appeals of those orders. Because a challenge to the Board's initial order is considerably more likely to raise significant issues than any challenge to the Board's denial of a motion to reopen or reconsider,[6] significant delay in the judicial review of the initial order is, as a general matter, likely to slow the overall disposition of deportation proceedings.[7] In light of the "fundamental

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motion to reopen or reconsider. See, *e.g.*, *Ogio* v. *INS*, 2 F.3d 959, 960 (9th Cir. 1993) (dismissing petition for review filed while motion to reconsider was pending before Board, even though both INS and alien argued that court of appeals had jurisdiction); *Chu* v. *INS*, 875 F.2d 777, 779-780 (9th Cir. 1989) (dismissing petition filed by alien while motion to reopen or reconsider was pending before Board); *Fayazi-Azad* v. *INS*, 792 F.2d 873, 874 (9th Cir. 1986) (same). The significant backlog of cases before the Board also makes it relatively onerous to force an alien to wait for the Board's disposition of a motion to reopen or reconsider before seeking judicial review of the underlying order. See, *e.g.*, Pet. App. A7 (noting that "it took the Board of Immigration Appeals more than 17 months to reject as frivolous the motion for reconsideration filed here").

[6] See *INS* v. *Doherty*, 112 S. Ct. 719, 724 (1992) (explaining that motions to reopen and reconsider "derive solely from regulations promulgated by the Attorney General," and that "the Attorney General has 'broad discretion' to grant or deny such motions"); see also *Brotherhood of Locomotive Engineers*, 482 U.S. at 277-281 (discussing general principles governing judicial review of administrative denials of motions to reconsider).

[7] See *Bauge* v. *INS*, 7 F.3d 1540, 1542 (10th Cir. 1993) ("If a motion for reconsideration were to render an order nonfinal, petitioners would be in a position to delay deportation for a significant period of time."); *White* v. *INS*, 6 F.3d 1312, 1316 (8th Cir. 1993) (under rule that allows aliens to toll time for filing petition for re-

purpose" this Court has discerned in the jurisdictional framework set out in Section 1105a—to "abbreviate the process of judicial review of deportation orders in order to frustrate certain practices * * * whereby persons subject to deportation were forestalling departure by dilatory tactics in the courts," *Foti* v. *INS*, 375 U.S. 217, 224 (1963)—we submit that the courts of appeals should have authority to review a final order of deportation even if the alien has filed a motion to reopen or reconsider. Accordingly, the filing of such a motion should not toll the 90-day (or 30-day) period for seeking judicial review.[8]

Our understanding of the proper interpretation of Section 1105a(a) is bolstered considerably by the 1990 amendment that added a new paragraph (6) to Section 1105a(a).[9] Paragraph (6) states: "[W]henever a petitioner seeks review of an order under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with the review of the order." In our view, Paragraph (6) rests on the assumption that a court of appeals would have juris-

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view by filing motion to reopen, "there apparently is nothing to keep an alien from filing such motions *ad infinitum*"); *Alleyne* v. *INS*, 879 F.2d 1177, 1181 (3d Cir. 1989) ("In the immigration context, Congress has determined that the potential for abusive appeals outweighs efficiency concerns.").

[8] Governing regulations specifically provide that the filing of a motion to reopen or reconsider an order of the Board shall not serve to stay the execution of the Board's decision. 8 C.F.R. 3.8(a).

[9] The provision was added by Section 545(b)(3) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5065. Like the alteration of the period for filing a petition for review discussed in note 4, *supra*, Section 1105a(a)(6) applies to all final orders entered on or after January 1, 1991. 1990 Act § 545(g)(4), 104 Stat. 5067. Those provisions apply to this case because petitioner's final order of deportation was entered on July 26, 1991.

diction over a petition for review of an underlying order of deportation while a motion to reopen or reconsider was pending. If the court of appeals did not have jurisdiction over such a petition, there would be nothing to consolidate with the petition seeking review of the Board's disposition of the motion to reopen or reconsider, because the alien would file a single petition seeking review of both orders when the Board disposed of any motion to reopen or reconsider. See Pet. App. A8; *Bauge* v. *INS*, 7 F.3d 1540, 1542 (10th Cir. 1993); *White* v. *INS*, 6 F.3d 1312, 1317 (8th Cir. 1993); *Akrap* v. *INS*, 966 F.2d 267, 270-271 (7th Cir. 1992). But see *Ogio* v. *INS*, 2 F.3d 959, 960 (9th Cir. 1993).

2. As the court of appeals pointed out (Pet. App. A5-A6), the courts of appeals that considered the question before the 1990 amendment were deeply divided. Compare, *e.g.*, *Alleyne* v. *INS*, 879 F.2d 1177, 1181 (3d Cir. 1989) (time to file petition for review not tolled), with, *e.g.*, *Hyun Joon Chung* v. *INS*, 720 F.2d 1471, 1473-1474 (9th Cir. 1983) (time to file petition for review tolled), cert. denied, 467 U.S. 1216 (1984); *Fleary* v. *INS*, 950 F.2d 711, 712-713 (11th Cir. 1992) (same).[10]

There also is a conflict among the courts that have considered the question in cases arising since the 1990 amendment to Section 1105a(a). A majority of those courts have relied on the consolidation provision in the

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[10] See also *Attoh* v. *INS*, 606 F.2d 1273, 1275 n.15 (D.C. Cir. 1979) (time to file petition for review tolled only by good faith motions to reopen or reconsider); *Pierre* v. *INS*, 932 F.2d 418, 420-421 (5th Cir. 1991) (same). The Eighth Circuit expressly rejected that rule based on its view that "it is well beyond the scope of our role under the Immigration and Nationality Act (INA) as described by Congress to determine whether an alien has filed a motion to reopen or reconsider in 'good faith' in order to decide if we have jurisdiction." *White*, 6 F.3d at 1314.

new paragraph (6) of Section 1105a(a) to support the conclusion that a motion to reopen or reconsider does not toll the time to file a petition for review. See Pet. App. A8 ("Whatever the law may have been previously, we do not believe that the Ninth Circuit approach is consistent with the statute as amended in 1990."); *Bauge*, 7 F.3d at 1541-1542 (10th Cir. 1993); *White*, 6 F.3d at 1313-1317 (8th Cir. 1993); *Akrap*, 966 F.2d at 269-271 (7th Cir. 1992) ("In our view, the 1990 addition of Section [1105a(a)(6)] has put to rest any conflict that had previously existed on that issue.").

The Ninth Circuit, on the other hand, recently reaffirmed its view that a motion to reopen or reconsider tolls the time for filing a petition for review. *Ogio*, 2 F.3d at 960-961. In the opinion in that case, the Ninth Circuit acknowledged that the Seventh Circuit had relied on the 1990 amendment to Section 1105a to justify a different result, but concluded that it was appropriate to adhere to the view it had articulated in *Hyun Joon Chung*. 2 F.3d at 960.[11] Because the Ninth Circuit has declined to retreat from its view notwithstanding the acknowledged

[11] Although the opinion of the Eleventh Circuit in *Fleary* v. *INS*, 950 F.2d 711 (1992), stated that the filing of a timely motion to reopen or reconsider tolls the time for filing a petition for review even after the enactment of Section 1105a(a)(6), 950 F.2d at 713, that statement was not necessary to the decision. First, *Fleary* involved a final order of deportation issued on May 15, 1990, as to which Section 1105a(a)(6) did not apply. See note 9, *supra*. Second, the Eleventh Circuit actually denied relief in *Fleary*, on the ground that the alien had not filed a timely petition for review of the motion to reopen after the Board denied that motion. 950 F.2d at 712-713. Accordingly, the Eleventh Circuit's discussion of how it would dispose of a case in which an alien filed a single petition seeking review of a final order of deportation and of a subsequent motion to reopen or reconsider was entirely hypothetical.

circuit conflict, it is unlikely that the conflict will dissipate in the foreseeable future. Accordingly, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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